

## NOTES AND COMMENTS

### MORE ABOUT THE "LAW" OF REAL COVENANTS AND ITS RESTATEMENT.

Mr. Sim's article in the September *Quarterly* entitled, "The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute"<sup>1</sup> is in the grand tradition of legal scholarship. A judicious appraisal of English legal history and a careful analysis of modern precedents culminate in a convincing exposition of sound and realistic policy in the light of practical conveyancing problems of the present day. Most attractive is the courage and sturdy intellectual integrity which has led him to challenge the views now embodied in the latest product of the American Law Institute.<sup>2</sup> From the beginning of its existence, Mr. Sims has been one of the Institute's most loyal supporters and officers; that he felt compelled to publish so devastating a critique speaks volumes as to the quality of this most controversial of Restatements.

As Mr. Sims points out, he and I are the only American authors who have ventured books about this small, but interesting, corner of property law;<sup>3</sup> and we both share the honor of complete repudiation in this Restatement. Moreover, we both have attempted extensive criticism of the Restatement, accompanied by analyses of the relevant precedents,<sup>4</sup> which so far have brought forth only the most meager of responses, without case analysis, from the Institute's Reporter. We are taught from legal childhood that "the burden of proof never shifts"; it is interesting to see how the Institute, by simply announcing a novel version of the law and assuming support of uncited authorities,<sup>5</sup> and by frowning upon all opposition,<sup>6</sup> has effectually

<sup>1</sup>(1944) 30 CORNELL L. Q. 1.

<sup>2</sup>RESTATEMENT, PROPERTY, Group No. 2, Div. V, Servitudes (Proposed Final Draft No. 2, 1944).

<sup>3</sup>SIMS, COVENANTS WHICH RUN WITH LAND, OTHER THAN COVENANTS FOR TITLE (1901); CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND (1929). English books such as those of Behan, Browne, Jolly, and Preston and Newson do not discuss early English legal history or the American precedents; they are confined largely to the law of restrictive covenants.

<sup>4</sup>Sims, *supra* note 1; and Clark, *The American Law Institute's Law of Real Covenants* (1943) 52 YALE L. J. 699.

<sup>5</sup>See article by the Reporter, Professor Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment* (1944) 53 YALE L. J. 312, 313, 323, suggesting that the writer has made "an improper use of authorities" by not accepting certain eclectic distinctions which would make "the converse authority overwhelming," but that until accepted "a consideration of his authorities seems needless." Compare Clark, *A Note on Professor Rundell's Comment* (1944) 53 YALE L. J. 327, pointing out that, whatever the Reporter's finespun distinctions, he has not and cannot marshal a real support for his § 82, not to speak of his wholly novel and much more drastic § 85—conclusions which are substantially re-enforced by Mr. Sim's article. Whether the published volume will contain supporting commentaries, so far unsupplied, is not known; the "Important Notes" of Proposed Final Draft No. 2 of this Restatement include Mr. Sims's criticism of the historical note, but no response by the Reporter.

<sup>6</sup>Compare Judge Goodrich, Adviser on Professional Relations, *American Law Institute*

shifted the burden of showing the unreality of that support, as well as the rational objections to the newly fashioned law, upon those who have the hardihood still to disagree. My only real quarrel with Mr. Sims's article—a limited one, indeed, in view of my wholehearted agreement with his major conclusions—is that he has accepted that burden too literally. In short, he errs in overgenerosity to the work he criticizes. True, a mild statement can often be more forceful to persuade than vigorous argumentation; and so long as there was hope that the Institute might reconsider its views there were strong reasons for the moderate tone to which his generous nature would have inclined him in any event. But since that hope is now found to be groundless, and the Institute's product is to go forth unchanged, it must be left to find its true worth in the courts and with the writers and students. As an aid to its final evaluation, and in the endeavor to make and keep clear the issues involved, I believe it worth while for me to state briefly those points on which I think Mr. Sims has conceded overmuch to the Restatement.

The real divergences in view between Mr. Sims and myself come down to two points: one as to a detail of the legal history, and one as to the present state of the authorities on "privity of estate." Here, too, I accept the ultimate conclusions critical of the Restatement, but believe he has not fully stated the strength of his own case. The first point arises in connection with his criticism of an Introductory Note to Part III ("Of Servitudes") of the Restatement which assumes to state the origin and development of the law of real covenants and which, as he rightly says, lays "the basis for declaratory sections greatly hampering and, it would appear, directed to checking the future running of the burden of covenants." The second deals with his count of authorities with reference to these "hampering" and "checking" sections.

Since I have considered elsewhere the somewhat technical issues here involved, I shall not restate them in detail, but beg the reader's leave to incorporate my previous discussion by reference.<sup>7</sup> It seems that the Reporter, for reasons which still appear obscure, has assumed a position of intransigent opposition to the running of the burden of covenants, viewing them as undesirable encumbrances on title;<sup>8</sup> but finding the current of authority in favor of running too strong for an outright declaration of invalidity, he casts his opposition in the form of hampering sections. Hence his history is framed in terms of the well known nonassignability of choses in action, or of ordinary simple contracts—a development in fact much later than

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*Annual Meeting* (1943) 29 A.B.A.J. 353, 356 ("the fundamental policy of the Institute" "to restate the law not to make it" "was made clear in the action taken"). In his annual report May, 1944, Judge Goodrich expressed distaste for the prolongation of the discussion. For treatment of minority views, see Appendix II to the writer's article, *supra* note 4, (1943) 52 YALE L. J. at 727, 728, 737, 738. For all that Proposed Final Draft No. 2, *supra* note 2, discloses, opposition has been finally submerged.

<sup>7</sup>See the article cited *supra* note 4; App. I, entitled "American Privity Cases," contains what is believed to be a complete digest of relevant authorities.

<sup>8</sup>His article, *supra* note 5, shows his bias, but hardly the reason why it is so strong.

that of real covenants. Thus he treats this highly indigenous *property* subject as "an exception to the rule against assignability of choses in action," says revealingly that "one might naturally expect that if the burden of promises to protect the title to land and of promises respecting its use were to be permitted to run at all the permission would be more restricted than in the case of the running of the benefit of such promises," naturally concludes that "such an expectation is borne out by the facts," and then makes the frank disclosure: "The doctrine of running covenants produces an artificial liability supported on technical grounds. I do not believe it is the part of wisdom to extend the area of that liability by making those grounds less technical."<sup>9</sup> At the 1944 Annual Meeting of the Institute, the historical note embodying these views was retained over Mr. Sims's fully documented objections by virtue of a tie vote of 17 to 17. In this article Mr. Sims has again presented his objections with a wealth of detail and support, and they stand unanswered and, it is believed, unanswerable.

Passing what might be thought a peculiarly American way of settling a disputed point of English legal history—a tie vote at the fag end of a long convention—we may come at once to the argument. And that is almost painfully simple. The burden did run in early English law, and the reported cases show it. Mr. Sims sets forth a considerable number of such cases. I wish to add others which are not only interesting in themselves, but important as showing the rationale on which they rest.

In his analysis Mr. Sims accepted a view of the origin of real covenants which had been propounded by earlier scholars—that they developed from the ancient warranty of title.<sup>10</sup> Such warranty was recognized from an early date and enforced through the process of vouching to warranty or by the action *warrantia chartae*.<sup>11</sup> That the warranty presents a valuable analogy supporting transferability of real covenants is certainly obvious; indeed, it is hard to see why a legal system which has accepted so extensive a running obligation as a warranty would find reason to gag at a simple covenant involving duties with respect to land. Moreover, the acceptance of the warranty surely demonstrates that any theory of nonassignability of choses in action has no place in the law of real covenants. Further still, it shows that a covenant involving the payment of money damages may run, and that a real covenant may exist in gross, *i.e.*, with only one end attached to and running with a particular parcel of land. But the analogy, though most useful, is not exact; the warranty, while far-reaching in the aspects noted, is otherwise less extensive than the ordinary real covenant. For one

<sup>9</sup>Proposed Final Draft No. 2 (1944), 43, 45, 55.

<sup>10</sup>Mr. Justice Holmes, while noting this view, did not accept it as applied to other than covenants of title; he found a closer analogy in active easements. HOLMES, *THE COMMON LAW* (1881) 381-409; *Norcross v. James*, 140 Mass. 188, 2 N. E. 946 (1885); CLARK, *COVENANTS* (1929) 93, 94, 102-104; Sims, *supra* note 1, (1944) 30 CORNELL L. Q. at 5, 6.

<sup>11</sup>*Cf.* Rabinowitz, *The Origin of the Common-Law Warranty of Real Property and of the Inchoate Right of Dower* (1944) 30 CORNELL L. Q. 77; CLARK, *loc. cit. supra* note 10.

thing, it is a part of a transfer or grant; for another, its running is restricted to the *benefit* of the covenant, while the *burden* remains with the warrantor. Hence it does not really explain the ancient cases cited by Mr. Sims himself.<sup>12</sup>

But the direct precedent is supplied by another line of authorities, that of covenants in fines, which were actually enforced just as are modern real covenants. Indeed, since ancient conveyancing of land titles was symbolical, by livery of seisin rather than by written instrument, the natural place where obligations comparable to modern real covenants might be found would be in that form of transfer used in place of livery, to wit, the collusive lawsuit resulting in the judgment of the fine. And so we find such obligations contained in medieval fines and enforced by actions essentially of covenant instituted with the writ *de fine facto*. A series of such cases was collected by me in an essay first published in 1922 and later republished in 1929, which shows the running of both benefit and burden in situations too nearly like our modern covenant to leave the matter in question.<sup>13</sup> Among obligations so enforced were a fine for services, a covenant made between the fathers of the immediate parties that plaintiff might have one hundred pigs in a certain wood, a covenant by a father not to alienate, enforced as against purchasers from the father, and—perhaps most striking—a fine made by defendant's father to forego the remedy of distress for cattle entering his land for the promise of money damages according to an agreed scale.<sup>14</sup> Let us put it this way: that Mr. Sims introduces us to worthy collaterals in the real covenant's family tree, but this line of cases shows its veritable progenitors in the direct line of ascent. And such direct precedents, it is submitted, cannot be dismissed to satisfy the Reporter's dialectical needs or because the Institute by tie vote has doubted their existence.

The other point requiring comment is Mr. Sims's overgenerosity in finding the case authority for the curious hampering and checking sections of the Restatement. There are other valuable things in the article, such as the criticism of the application of the Statute of Frauds to real covenants as made in the Restatement, and the demonstration by a state-to-state analysis that the burden of a covenant does run by the overwhelming weight of

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<sup>12</sup>See, e.g., Y. B. 4 Edw. III, f. 57, pl. 71 (1329); Y. B. 7 Edw. III, f. 65, pl. 67 (1332), reprinted (1944) 30 CORNELL L. Q. at 8, covenant not to build another mill on the same tenement enforced against successors in title; and compare, of course, Fakenham's Case, Y. B. 42 Edw. III, f. 3, pl. 14 (1368); Woodbine, *Fakenham's Case* (1929) 38 YALE L. J. 775; Horne's Case, Y. B. 2 Hen. IV, f. 6, pl. 25 (1400); AMES, LECTURES ON LEGAL HISTORY (1913) 98, 102, 123, n. 3; SALMOND, HISTORY OF CONTRACT, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 320, 324.

<sup>13</sup>Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants* (1922) 32 YALE L. J. 123, 140; CLARK, COVENANTS (1929) 105-107.

<sup>14</sup>The last case, wherein the defendant was held liable in damages for detaining the plaintiff's cattle, is Y. B. 20-21 Edw. I (Rolls ed.) 244-249 (1292), again appearing in Y. B. 21-22 Edw. I (Rolls ed.) 112 (1293); the others appear in BRACTON'S NOTE BOOK, plea 158 (1222), plea 1129 (1234, plea 36 (1219), and plea 804 (1233), while additional cases are cited in CLARK, COVENANTS (1929) p. 104, n. 80, p. 106, n. 80h. That covenant lay upon a fine, see Bingham v. Merton, Y. B. 22 Edw. IV, f. 1, pl. 6 (1482).

authority in this country.<sup>15</sup> But we may pass at once to Mr. Sims's consideration of the two sections of the Restatement greatly restricting and obviously designed to limit or prevent the transfer of the burden of real covenants with the land. The first section involved, Section 82, is entitled "Privity between Promisee and Promisor"; without attempting to re-examine here the technical form in which it is cast, we may say shortly that in subdivision (a) it attempts to set forth the view that the covenant must be a part of a transfer of some interest in land either from covenantor to covenantee or vice versa, *i.e.*, the so-called privity by way of grant, and in subdivision (b) as an alternative, that the privity may be by way of an easement, *i.e.*, the Massachusetts rule of privity by "substituted tenure."<sup>16</sup>

The really drastic prohibition, however, appears in Section 85, with moreover, a slyness that is distressing to observe in a body so distinguished as the restaters. Up until this year it bore the title "Promises 'Touching and Concerning' Land," thus assuming to embody the well known and settled rule that a running obligation must have some relation to the land involved in the metaphorical expression "touch and concern," and not be merely personal to the promisor.<sup>17</sup> Actually it did not embody that rule at all, but set forth an involved attempt to restate the Massachusetts rule in a way to establish a quantitative test of benefit to the promisor's land as bearing a reasonable relation to the benefit to the promisee's land, thus incidentally prohibiting the running of a covenant where one end was held in gross. This section received well-nigh universal disapproval not only for its incoherence, but also for its masquerading as something which it was not.<sup>18</sup> But, nothing daunted, the Reporter has embodied it in the final Restatement, in somewhat of a new dress, with, however, the drastic balancing of interests still retained and with a hint of confession of its bastard origin by dispensing with its original name and substituting "Relation of Benefit and Burden." This must be the most amazing Restatement ever penned! Hardly any one but its creator has had a good word for it; and there literally is not a single case which supports it. Even the Massachusetts cases, already employed to father subdivision (b) of Section 82, do not support any such quantitative

<sup>15</sup>Such running the Restatement assumes to accept, only to "check" it by the technical restrictions hereafter discussed. Mr. Sims holds that only two states deny the running of covenant burdens—New Jersey and Virginia—thereby concluding with some reason that as to New York, *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*, 278 N. Y. 248, 15 N. E. (2d) 793 (1938), has repudiated the prohibition stated in *Miller v. Clary*, 210 N. Y. 127, 103 N. E. 1114 (1913). As to this, compare Clark, *supra* note 4, (1943) 52 YALE L. J. at 718, 734, 836, pointing out also the by no means definitive nature of the cases from New Jersey and Virginia.

<sup>16</sup>When this section was considered in its earlier form in the writer's article *supra* note 4, (1943) 52 YALE L. J. at 708, the order in which the two subdivisions appeared was reversed, the Massachusetts rule appearing first.

<sup>17</sup>See the authoritative statement of the rule by Dean Bigelow, *The Content of Covenants in Leases* (1914) 12 MICH. L. REV. 639, (1914) 30 L. Q. REV. 319, also discussions by Mr. Sims and the writer, *supra* notes 1, 3, 4.

<sup>18</sup>The rocky road traversed by this section is pointed out in (1943) 52 YALE L. J. at 727, 728, 737, 738.

test; and, though there still seems some attempt to look to the touching and concerning doctrine for some support, no case applying that doctrine has been cited or is actually available for such a test.<sup>19</sup>

Now the surprising thing is that the distributing of overlapping restrictions between two sections, instead of increasing the difficulty of finding support for the combination, has actually served to cloud the issue so as to make support for a part seem to do duty for the whole. Thus it is usual to criticize Section 85 as confusing and undesirable in itself and as not being in reality a clear statement of the old doctrine of "touching and concerning"—all sound, enough so far as it goes, except that it fails to take note of the effect of the section in applying the final coup de grâce to those covenants which survive Section 82. And that is vitally important; for while the restrictions of Section 82 are irrational, conflicting, and confusing, they are not very deadly, since most covenants fall within either one or the other of its two subdivisions.<sup>20</sup> Only when the balancing scales of Section 85 are brought in do the restrictions of Section 82 attain the dignity of a total prohibition in every case a court may choose, and—there being no standard of relative values stated—cast doubt upon the validity of every real covenant until it has been sustained by the highest court of the state. Even if cases are discovered which tend to support one subdivision of Section 82, they are obviously insufficient to justify the entire Restatement; and yet it is so constructed that the prohibition must be taken as a whole. In short, the lack of support for Section 85 leaves the entire scheme of prohibition unsupported.

Hence Mr. Sims should not have restricted himself to a search of support only for Section 82, leaving Section 85 to merely the general criticisms of incoherence and false masquerading. But, coming to the ground he has chosen, he first rejects as unintelligible that part of Section 82 which deals with the Massachusetts rule;<sup>21</sup> and then turning his attention to the first subdivision, he surveys the cases and concludes, "Seventeen states still seem to require a grant, and seven states seem not to do so."<sup>22</sup> As he quite prop-

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<sup>19</sup>In his article *supra* note 5, the Reporter cites as support only the case of *Orenberg v. Johnston*, 269 Mass. 312, 168 N. E. 794 (1929), which confirms the view that this is an attempt to blow up to limits entirely indefinite the Massachusetts rule of covenant in aid of an easement already stated in § 82(b). See the writer's article *supra* note 5, (1944) 53 YALE L. J. at 328.

<sup>20</sup>See examples of its irrationality, notes 25, 39 *infra*, also (1943) 52 YALE L. J. at 707, 710, 721—which after all were perhaps a little abnormal, since more usually there seems no covenant duty so weak that its correlative right may not be considered the "grant" of at least an easement, notes 27-32 *infra*!

<sup>21</sup>*Cf.* (1944) 30 CORNELL L. Q. at 32, "so difficult to construe that it might well have been omitted to save confusion of the question," which may well be a proper epitaph on the confusing and trouble-breeding Massachusetts rule, or on its inadequate embodiment in § 82(b); see (1943) 52 YALE L. J. at 706, 708, 711, 733.

<sup>22</sup>(1944) 30 CORNELL L. Q. at 31, citing and analyzing, in n. 190, 33 cases from 24 states. In App. I to (1943) 52 YALE L. J. 731-736, the writer briefed some 140 cases from 41 states, of which almost all actually upheld the running of covenants; see (1943) 52 YALE L. J. at 720, n. 73.

erly points out, this is hardly a weight of authority sufficient to prevent the other twenty-four states from following the more rational rule of the seven states. But I think it can be thoroughly demonstrated that he has much overstated the actual support for even this limited part of the Restatement.

Examining the cases he reviews (and others in my judgment could have been added), I think we may first accept the seven states he cites as support for his position,<sup>23</sup> though I take it the Reporter would challenge even them on grounds not altogether clear.<sup>24</sup> Of the opposing cases cited, there are first the three well known decisions which actually did require a grant and which themselves constitute the best evidence of the undesirability of the rule—decisions from Maine, Nevada, and Wyoming, of which only the latter is at all recent or contains any rationalization of the result.<sup>25</sup> Next, two cases must clearly have been included by mistake; the decisions turn on other matters entirely without any reference to this supposed doctrine.<sup>26</sup> Of the cases from the remaining twelve states all are admittedly dicta only. But what dicta! If Mr. Sims had not accepted the heavy burden of proof placed on all who assume to doubt a Restatement, I am sure he would actually count very few of these as really for the assumed rule.

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<sup>23</sup>The seven states are California, Kansas, Michigan, Minnesota, Montana, Nebraska, and Pennsylvania. The California law requires special consideration, since a statute makes it oddly the converse of what is claimed in the Restatement, *i.e.*, the burden may not run when contained in a conveyance, but may in other cases, *see* (1943) 52 YALE L. J. at 731. Of the others, I have already cited them as showing actual or probable support for his and my view except perhaps Nebraska, where there are somewhat conflicting data, *see* note 25 *infra*; and I would add to this list *Alabama*, *Arkansas*, *Connecticut*, *Georgia*, *Illinois*, *Indiana*, *Maryland*, *New Mexico*, *North Carolina*, *South Dakota*, *Texas*, and *Washington*, and find nothing really inconsistent to prevent the adoption of such a rule in *Colorado*, *Iowa*, *Kentucky*, *New Hampshire*, *Ohio*, *Oklahoma*, *Oregon*, and *Wisconsin*. *See* (1943) 52 YALE L. J. at 720, 721, 731-736. The states I have italicized are those where my analysis differs from Mr. Sims's, as pointed out in notes 25-32 *infra*; as to the others I shall not repeat here my discussion of them in my article. Particularly incontrovertible, as I still think, are those cases where the burden runs, although the benefit is personal (1943) 52 YALE L. J. at 719, n. 71.

<sup>24</sup>Compare his article, *supra* note 5.

<sup>25</sup>*Smith v. Kelley*, 56 Me. 64 (1868); *Wheeler v. Schad*, 7 Nev. 204 (1871); *Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n*, 43 Wyo. 41, 297 Pac. 385 (1931). The first case strikes down a reasonable covenant executed one day after the conveyance; the second, one executed six days after the conveyance. The *Lingle* case struck down a reasonable water-rights and irrigation agreement, of the kind almost universally approved in the other arid western states: it failed to note the legal history discussed above or to distinguish the various forms of privity and their bearing, as shown by recent law review literature, on the actual problem before the court, *cf.* (1943) 52 YALE L. J. at 720, 721; note 39 and accompanying text *infra*.

In addition I have thought it necessary to add to this group a somewhat equivocal decision from Tennessee, *Louisville & N. R. R. v. Webster*, 106 Tenn. 586, 61 S. W. 1018 (1901), possibly not representative of the entire Tennessee law, (1943) 52 YALE L. J. at 720, 736, as well as inconclusive dicta from Missouri and Nebraska, though it may be that the case cited by Mr. Sims from the latter state, *Loyal Mystic Legion v. Jones*, 73 Neb. 342, 102 N. W. 621 (1905), offsets the inconclusive dictum in *Farmers & Merchants Irrig. Co. v. Hill*, 90 Neb. 847, 134 N. W. 929 (1912).

<sup>26</sup>*Levy v. Dundalk Co.*, 177 Md. 636, 11 A. (2d) 476 (1940); *Epting v. Lexington*

If, however, the false burden of proof in favor of an Institute product is rejected and the cases are examined for their own worth, it will be seen that their dicta range from weak to nonexistent. In fact, Mr. Sims shows as much, as to six states, in saying repeatedly that the court "evidently" thought a grant necessary, thus stamping each of these decisions as one of those which the Reporter has been able to rely upon only by a process of involved inference.<sup>27</sup> As to another, inference is piled on inference, since it is included only because the court has cited one of the "evidently" cases from another state.<sup>28</sup> To only three jurisdictions of this group is a direct statement ascribed; but New York, with its peculiar and confused history, is certainly not fairly to be included;<sup>29</sup> and the basis for including the other two is most doubtful.<sup>30</sup> The operation of the pseudo-burden of proof is perhaps most obvious in acceptance of lower court dicta against supreme

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Water Power Co., 177 S. C. 308, 181 S. E. 66 (1935). In both there was a grant, though that is not adverted to; the first was a restrictive covenant not benefiting other land; the second was reasonably held a personal covenant. More important is Union Trust Co. v. Rosenberg, 171 Md. 409, 189 Atl. 421 (1937), which makes liability depend in orthodox fashion upon the duration of privity of estate *by succession*, i.e., to one side of the covenant only, a requirement admitted by all, including RESTATEMENT, PROPERTY (2) (Proposed Final Draft No. 2, 1944) § 83, and correctly referred to by Holmes as the only true privity. HOLMES, THE COMMON LAW (1881) 404; Norcross v. James, 140 Mass. 188, 189, 191, 2 N. E. 946 (1885).

<sup>27</sup>Farmers' High Line Canal and Reservoir Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 92 Pac. 290 (1907), actually upheld the running of an irrigation contract; the few blind remarks of the court about privity may well refer to the true privity stated in note 26 *supra*. Sexauer v. Wilson, 136 Iowa 357, 113 N. W. 941 (1907), upheld a fencing covenant which was actually in a deed poll, and held the word "assigns" unnecessary. As to West Virginia and Wisconsin, there are additional cases to those cited by Mr. Sims which I believe tend to support the likelihood that when actual decision becomes necessary the courts will not require interparty privity, (1943) 52 YALE L. J. at 736; compare the definite questioning of privity doctrines in Wooliscroft v. Norton, 15 Wis. 217, 224 (1862); and Lydick v. B. & O. R. R., 17 W. Va. 427, 436, 437 (1880), where the courts point out that some authorities state the rule more broadly, although the covenants before them satisfy even the narrower rule. For Alabama, Georgia, and New Mexico, see notes 28, 32 *infra*.

<sup>28</sup>Bolles v. Pecos Irrig. Co., 23 N. M. 32, 167 Pac. 280 (1917), which did cite Sexauer v. Wilson, 136 Iowa 357, 113 N. W. 941 (1907), cited *supra* note 27, but actually upheld a simple and reasonable irrigation covenant; calling the water right an easement is only another example of judicial desire to make sure these desirable covenants run under any view. See also Murphy v. Kerr, 5 F. (2d) 908 (C. C. A. 8th, 1925), to similar effect.

<sup>29</sup>See note 15 *supra*. The late case relied on, Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank, 278 N. Y. 248, 15 N. E. (2d) 793 (1938), contains only a most formal recital of potential requirements, citing *this writer's* book, *op. cit. supra* note 3, at 74.

<sup>30</sup>Swiss Oil Corp. v. Dials, 232 Ky. 298, 22 S. W. (2d) 912 (1929), has only the most formal and laconic of dicta, while the two cases cited from North Carolina—Herring v. Wallace Lumber Co., 163 N. C. 481, 79 S. E. 876 (1913), and Norfleet v. Cromwell, 64 N. C. 1, 14 (1870)—do not turn upon the presence or absence of a grant, and the latter definitely criticizes the privity requirement. For other cases from both jurisdictions upholding running covenants and justifying a conclusion in favor of transferability, see (1943) 52 YALE L. J. at 732, 734.



court repudiation of the doctrine, notably in Texas,<sup>31</sup> while in other states all doubts in somewhat conflicting cases are resolved in favor of the Restatement.<sup>32</sup> That is the total count. Of course, Mr. Sims would not have originated so cavalier a way of analyzing cases; he has simply accepted the method the Reporter has indicated as the Restatement approach to the cases.<sup>33</sup> And, of course, neither he nor I would wish to support a doctrine contrary to policy and practicality merely by a count of cases; but that is the Institute's chosen standard.

That there is so little bona fide support for the doctrine may come as a surprise to those who have not undertaken the drudgery of examining the cases. This much must be said, that there has appeared recurrently, particularly in older texts, some doctrine known as "privity of estate," though it has generally remained nebulous and undefined. But when it has come into contact with the actual cases, it has yielded to the practical realities which show such covenants to be generally useful and desirable in such simple and reasonable activities as adjustment of water and irrigation, party-wall, and fencing rights, and duties of repair and the like. Hence practically all the cases uphold running; it is the rare exception which does not.<sup>34</sup> The real explanation is that pseudo-history has been allowed to masquerade as real history, to only the text writers' joy and to the apparent confusion

<sup>31</sup>The case here relied on is *Panhandle & S. F. Ry. v. Wiggins*, 161 S. W. (2d) 501 (Tex. Civ. App. 1942), where a party-wall covenant was upheld, and there was a purely formal statement that privity was necessary without reference to a single Texas case. But *McCormick v. Stoneheart*, 195 S. W. 883 (Tex. Civ. App. 1917), has one of the ablest criticisms of the privity rule existing; it was criticized in *Jones v. Monroe*, 262 S. W. 541 (Tex. Civ. App. 1924), which, however, was reversed 285 S. W. 1055 (Tex. Com. App. 1926), affirmed 288 S. W. 802 (Tex. Com. App. 1926); and see also *Missouri, K. & T. Ry. v. State*, 275 S. W. 673 (Tex. Civ. App. 1925); *Ball v. Rio Grande Canal Co.*, 256 S. W. 678 (Tex. Civ. App. 1923); *Parks v. Hines*, 68 S. W. (2d) 364 (Tex. Civ. App. 1934), affirmed *Hines v. Parks*, 128 Tex. 289, 96 S. W. (2d) 970 (1936); (1943) 52 YALE L. J. at 736. The other case cited, *Talley v. Howsley*, 170 S. W. (2d) 240 (Tex. Civ. App. 1943), appears not in point; there was a grant, and the case turns entirely on questions of estoppel by deed, as the affirming opinion in the Supreme Court, —Tex.—, 176 S. W. (2d) 158 (1943), shows.

<sup>32</sup>The several cases from Alabama, Georgia, and Indiana cited in (1943) 52 YALE L. J. at 731, 732, need not be here repeated except to point out how late Alabama cases, *Moseby v. Roche*, 233 Ala. 280, 171 So. 351 (1936); *Cummings v. Alexander*, 233 Ala. 10, 169 So. 310 (1936), uphold covenants made in separate instruments from deeds of conveyance, how Georgia cases uphold running, with a definite repudiation of privity doctrines in *Reidsville & Southeastern R. R. v. Baxter*, 13 Ga. App. 357, 363, 79 S. E. 187, 190 (1913), and how Indiana, notwithstanding a certain amount of loose dicta, actually goes so far as to uphold the running of the burden of a party-wall covenant while the benefit remains personal. *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198 (1885).

<sup>33</sup>But, as showing how these conclusions gain in dogmatism by repetition, Mr. Sims has said more recently that "a considerable majority of the States in America which recognize the running of the benefits and burdens of covenants to assignees of the original parties, hold that the covenants must originate in a grant of an interest in the affected land. . . ." Sims, *The Law of Real Covenants in Alabama* (1945) 6 Ala. Lawy. 73, 77.

<sup>34</sup>See the count of cases by the writer in the citation given in note 22 *supra*.

of many, but the actual confusion of few, courts. A dull and reactionary judge in England tossed off the idea of interparty privity in 1789 in a case where it was not in point, without the citation of an authority or any discussion;<sup>35</sup> and the idea was picked up in the editing of an important series of cases and given some early vogue.<sup>36</sup> It did have two early and major consequences, one demonstrably unfortunate, and the other equally so, in spite of its continued acceptance. In New York the theory was applied in some cases and not in others, so that the resulting utter confusion was resolved by the drastic prohibition of all such covenants in 1913, from which stand recession is once again developing.<sup>37</sup> And in Massachusetts the theory led to the local rule of "substituted privity," based on a misreading of history and preventing the use of many simple and worth while agreements, particularly those where one end was held in gross.<sup>38</sup> But the tide had turned against these irrationalities. Except for the one unfortunate Wyoming decision of 1931 which had failed to note history and the doctrinal trend,<sup>39</sup> there was no recent actual support for the theory; and the important and valuable law review literature had marshalled critical opinion the other way.<sup>40</sup> And now comes the Restatement not only to resurrect this decayed doctrine, but to build upon it a superstructure more ambitious, complicated, and restrictive than anything heretofore suggested.

In his opening sentence, Mr. Sims makes his first generous concession when he says that it is unfortunate that this Restatement "should have reflected the particular views of the Reporter and a majority of his Advisers." The first part of the statement is true; the second is not, as the record clearly shows. It is a natural conclusion that a restatement represents the combined judgment not only of a single reporter, but also of a trained body of experts sitting with him as advisers; even Mr. Sims, though an officer of the Institute, has accepted that popular belief. Actually that is no more true than each individual reporter is willing to make it. The theory of the Restatement is that all differences are finally submerged into a single exposition of the law; hence the dissenting views are never noted in the final product, which bears the names of all those who have participated, whatever their disagreement with the result.<sup>41</sup> All that an objecting adviser can do is to take a futile appeal to the Council, where he does not appear in person and the reporter

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<sup>35</sup>Webb v. Russell, 3 T. R. 393, 402, 100 Eng. Rep. 639, 644 (K. B. 1789); *cf.* (1943) 52 YALE L. J. at 705, nn. 21, 22.

<sup>36</sup>See Mr. Sims's references to Smith's Leading Cases in (1944) 30 CORNELL L. Q. 10, 11.

<sup>37</sup>See notes 15, 29 *supra*.

<sup>38</sup>See (1943) 52 YALE L. J. at 706, 733, pointing out, *inter alia*, the compensating development of "affirmative easements"; and *cf.* note 21 *supra*.

<sup>39</sup>Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n, 43 Wyo. 41, 279 Pac. 385 (1931), cited *supra* note 25.

<sup>40</sup>See citation (1943) 52 YALE L. J. at 723, n. 87; these authorities are, of course, repudiated by the Restatement.

<sup>41</sup>Thus, the important objections to other parts of this Restatement, *e.g.*, the treatment of easements in gross, (1943) 52 YALE L. J. at 715, n. 52, now stand submerged.

does. Since the distinguished Council members can hardly be expected to repudiate their own expert on highly technical and specialized points of law, rejection of the appeal is inevitable. Thus, as experience shows, a determined reporter is bound to have his way. That result was perhaps even more inevitable here because of the combination of an unusually determined reporter, a highly esoteric subject, and a total restatement so near completion that delay in a comparatively minor part could not be tolerated. As the record shows, the milder provisions of Section 82 were unanimously disapproved by all the Advisers in September, 1941; but when the Reporter persisted, the final vote on the completed draft stood 4 to 3 for it (and apologetically at that).<sup>42</sup> On the more drastic provisions of Section 85, the final vote was 5 to 2 against it; and it has never been approved by the Advisers.<sup>43</sup> In actual fact only a *single* Adviser has accepted the Reporter's complete position and approved the interlaced provisions of the two sections which together make up the real restatement.<sup>44</sup>

Charles E. Clark\*

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<sup>42</sup>(1943) 52 YALE L. J. at 727, 728, 737, 738, pointing out that some of the majority only reluctantly accepted the Reporter's view because of his insistence on the compulsion of the cases.

<sup>43</sup>*Ibid.*; see also note 18 *supra*.

<sup>44</sup>Since this comment was prepared, there has appeared yet another critique of this restatement by a very distinguished adviser who discusses the cavalier treatment accorded some other problems in this field where settlement of a sort was also reached by convention vote. Aigler, *Measure of Compensation for Extinguishment of Easement by Condemnation* [1945] WIS. L. REV. 5, 36, 37.

Moreover, the Restatement itself has just appeared, RESTATEMENT, PROPERTY, DIVISION V, SERVITUDES, still without supporting commentaries by the Reporter on our present topic, but representing Mr. Sims, Professor Aigler, and myself, together with other dissenters, as fully supporting members of the Institute's "Committee on Property, Volume V." The INTRODUCTORY NOTE appears at pp. 3148-3161; the former § 82, as discussed in the text, is now § 534, at pp. 3205-3210, while the former § 85, now § 537, appears at pp. 3218-3224.

\*United States Circuit Judge, Second Circuit.

## STUDENT NOTES

**Bankruptcy: Farmers: What is income?**—Congress, in 1935, enacted Section 75 of the Bankruptcy Act, popularly known as the Frazier-Lempke Act or Farmers' Bankruptcy Act.<sup>1</sup> This act gives to the farmer bankrupt advantages of inestimable value never before given to any bankrupt and for this reason it is important to know what persons are farmers.

Section 75(r) defines farmers as follows:

For the purposes of this section and section 22(b) the term "farmer" includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur.

Over twenty cases arose out of this definition before the Supreme Court, in *First National Bank and Trust Company, Trustee, v. Beach*,<sup>2</sup> attempted to clarify its meaning. In that case the Court was faced with the problem of whether an individual, who receives the principal part of his income from the rent of a farm, is a farmer within the provisions of subsection (r). The debtor, Beach, owned a farm of which he occupied a part, living there and devoting most of his time to cultivation and other farm activities; the remainder, and greater portion of the farm, he let out to tenants, whose rents constituted the greater part of his income. Beach received a total annual income of \$4,000 of which over half, or \$2,200, came from rentals of leased farm land.

The Court might well have rested its decision that Beach was a farmer, within the intent of the Act, upon the fact that he actually lived on a farm and was personally engaged for the major part of his time in its operation. But it did not do so. It took a more devious route and found a relationship between the statutory definition and the fact that a portion of Beach's income also came as rents of a farm.

In holding that Beach was a farmer Mr. Justice Cardozo, writing for the Court, said, "to get a living out of the land in one way or another is the thread of common purpose which binds the labor and the leases, and enables us to find in them the tokens of the same vocation. In brief, the man is seen to be a farmer by every test of common speech, though his income has been garnered in rents as well as products."<sup>3</sup>

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<sup>1</sup>47 STAT. 1467 (1933), 11 U. S. C. § 203; amended, 49 STAT. 246 (1935); 54 STAT. 40 (1940); 58 STAT. 113 (1944).

<sup>2</sup>301 U. S. 435, 57 Sup. Ct. 801 (1937).

<sup>3</sup>*Id.* at 440, 57 Sup. Ct. at 804.

In other words, the debtor may, as the statute provides, be "personally engaged" in an enumerated operation or derive the major portion of his income from them. He need not meet both requirements, and the income may be in the form of rents.

Since the handling down of this decision, however, the lower federal courts have not uniformly adopted this latter test of rental income. The interpretations which they have given to Section 75(r) make it difficult today to tell who may claim the benefits of the act and who may not. In the case of *Shyvers v. Security-First National Bank of Los Angeles*<sup>4</sup> the Ninth Circuit held that an absentee landlord would not be deemed a farmer, for in order to come within the definition as one "the principal part of whose income is derived from any one of the foregoing operations," ". . . the debtor must personally be engaged in farming. It is not enough to own farm lands which he or she leases to others who operate them, while the debtor resides across the seas."<sup>5</sup> In this case the debtor owned 9300 acres of farm land in California which she leased to tenants while she lived in London, England, her only contact with the tenants being through agents and attorneys in this country. Those rentals constituted her principal income.

The distinction given in the *Shyvers* case seems unsound for it renders the last clause of the definition meaningless. If the clause, "the principal part of whose income is derived from one or more of the foregoing operations," as construed in the *Beach* case is to have any meaning at all it must include the absentee landlord.

The *Shyvers* doctrine, however, has spread rapidly throughout the country and has become law in at least three other circuits.<sup>6</sup> The First Circuit, in applying its doctrine, even went to the extreme of holding that a partner in a "Comunidad," which the court assumed to be engaged in farming operations, was not a farmer.<sup>7</sup>

It is paradoxical that the only doubt cast upon the validity of the *Shyvers* doctrine has come from the same court which established it, viz., the Ninth Circuit. In *Leonard v. Bennett*,<sup>8</sup> decided in 1940, the alleged bankrupt had left his farm after turning it over to a manager with instructions to apply all the revenue to the mortgage. In holding him to be a farmer the court, citing the *Beach* case, said, "If actual and literal engagement in farming were required of the petitioner at the very moment that he invokes the assistance of the act, in the sense that he must then have a plow in his hand, the aim of Congress would be rendered unavailing in numerous in-

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<sup>4</sup>108 F. (2d) 611 (C. C. A. 9th, 1939), 126 A. L. R. 674. *Cert. denied* 309 U. S. 668, 60 Sup. Ct. 608 (1940).

<sup>5</sup>108 F. (2d) 611, 612, 126 A. L. R. 674, 676.

<sup>6</sup>*Mulligan v. Federal Land Bank of Omaha*, 129 F. (2d) 438 (C. C. A. 8th, 1942); *Federal Land Bank of Omaha v. Wood*, 129 F. (2d) 89 (C. C. A. 8th, 1942), *cert. denied* 317 U. S. 662, 63 Sup. Ct. 63 (1942); *Dimmitt v. Great Southern Life Ins. Co. et al.*, 124 F. (2d) 40 (C. C. A. 5th, 1941).

<sup>7</sup>125 F. (2d) 523 (C. C. A. 1st, 1942).

<sup>8</sup>116 F. (2d) 128 (C. C. A. 9th, 1940).

stances where it was intended to apply and afford relief."<sup>9</sup>

It is true that these cases can be distinguished on their facts. In the *Beach* case there is a combination in that the alleged bankrupt is engaged both in farming and in renting farm lands. Mr. Justice Cardozo did not say Beach was a farmer solely because the major portion of his income came from rents, but he did hold that his rentals "made him not less, but more a farmer than he would have been without them."<sup>10</sup> In the *Shyvers* case the debtor rented her California farm lands, but unlike Beach she was not personally engaged in tilling the soil. In *Leonard v. Bennett* the debtor had personally worked the farm before he turned it over to the manager.

Argument may also be made that merely the owning of farm lands does not make one a farmer. The owner of a large office building is not an insurance agent because he rents the second floor to an insurance company, nor a druggist because he rents the ground floor corner to a druggist. But a portion of his income is derived from those operations. Mr. Justice Cardozo, in his dictum in the *Beach* case, intimates that the receipt of rent from farm lands does make one a farmer because in the eyes of the laymen he is called a farmer. He finds the lease to be a badge of the occupation as well as the labor itself. One may be a farmer for the purpose of a statute though not for all purposes.

Undoubtedly other factual differences may be found between the cases above cited, but their delineation would not be helpful here. They would only serve to strengthen the conclusion that further word from the court of last resort upon this subject is needed.

What the profession, as well as those for whose benefit the Act was passed needs, is a further clarification of the application of the income test included in the statute. The Act itself should be liberally interpreted to accomplish its obvious purpose of protection to those whose income comes from the farm. The statute makes no distinction between farms which are share cropped or leased for money rent. Surely the owner of a share cropped farm receives his income from farm operations, and the courts have so held.<sup>11</sup> There is no distinction between such income and money rent of a farm.

It would thus seem that the *Shyvers* case was erroneously decided and the United States Supreme Court should, at its first opportunity, further clarify that portion of the statute which defines income.

Margaret E. Bliss

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<sup>9</sup>*Id.* at 135.

<sup>10</sup>301 U. S. 435, 440, 57 Sup. Ct. at 804.

<sup>11</sup>*Williams v. Great Southern Life Ins. Co. et al.*, 124 F. (2d) 38 (C. C. A. 5th, 1941); *cert. denied* 316 U. S. 663, 62 Sup. Ct. 942; *rehearing denied* 316 U. S. 709, 62 Sup. Ct. 1040 (1942); *In re Pollock*, 46 F. Supp. 358 (W. D. La. 1942).

**Quasi Contract: Municipal Corporation: Payment of back taxes by installment: Default by taxpayer: Mistake.**—A New York tax statute authorizes a municipal corporation, upon resolution duly adopted, to allow an owner of real property to pay certain back taxes in installments, without penalty, if the taxes are paid within one year of the date of the resolution.<sup>1</sup>

After the City Council of Long Beach had adopted a resolution conforming to statutory procedure, the plaintiff entered into a written contract with the City whereby he agreed to pay his delinquent taxes amounting to \$3,274 in ten installments. The agreement provided that in case of any default in payments by the plaintiff for a period of ten days, all his rights and benefits accruing thereunder should be extinguished, "and all moneys paid under this agreement shall be applied on account of and in reduction of the aforesaid tax lien together with all interest, penalties and charges." The contract reserved to the City, in case of default of the taxpayer, the statutory power to enforce the collection of the tax lien in full, after crediting to the taxpayer all sums paid by him.

The plaintiff defaulted after paying eight installments aggregating \$2,688. After his default the City sold the tax lien for its face value without allowing credit to the plaintiff for the eight installments he had paid in reduction of the tax lien. Upon the City's refusal to return the sums paid to it in installments, the plaintiff instituted this action on the contract. The Nassau County Court denied the motion of the City to dismiss the complaint for failure to state a cause of action. The Appellate Division, two judges dissenting, reversed the County Court and granted the motion on the grounds that a party may not recover under an executory contract upon which he has defaulted.<sup>2</sup> On appeal, the Court of Appeals reversed the Appellate Division because the complaint stated a cause of action for money had and received.<sup>3</sup>

The purpose of the statute, which authorized this contract, was to enable the plaintiff to pay his taxes and to avoid the necessity of the sale of the tax lien by the city. To effectuate its purpose, the statute provided for a reduction of the amount of the taxes due and permitted the taxpayer to

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<sup>1</sup>"Notwithstanding any other general, special or local law, all penalties and interest on any unpaid taxes, assessments and water rents levied prior to April first, nineteen hundred forty-one on real property by any municipal corporation, . . . , and for the collection of which no sale of the property shall have been made, may be cancelled, revoked or reduced, provided such unpaid taxes, assessments and water rents are paid within period of one year from date of such reduction, cancellation or revocation, upon resolution heretofore or hereafter duly adopted by the governing body of any municipal corporation." N. Y. UNCONSOLIDATED LAWS (65 McKinney, 1944) § 9671.

" . . . If any such parcel of real property, or any such lien therein, be so withheld from a tax sale and thereafter default be made in payment by installment or otherwise of the remainder of such taxes levied on such parcel, such parcel, or such lien thereon or interest therein, may be sold at any tax sale succeeding such default held by such officer for the unpaid balance of such taxes together with any interest or penalties thereon and any other charges allowed by law." N. Y. UNCONSOLIDATED LAWS (65 McKinney, 1944) § 9672.

<sup>2</sup>MacMurray v. City of Long Beach, 266 App. Div. 679, 40 N. Y. Supp. (2d) 320 (2d Dep't 1943).

<sup>3</sup>MacMurray v. City of Long Beach, 292 N. Y. 286, 54 N. E. (2d) 828 (1944).

pay the reduced amount in installments. The contract expressly provided that in case of default by the taxpayer, the City Council could enforce its tax lien after crediting the installments paid thereon by the plaintiff.<sup>4</sup> In its brief, the city conceded that "the treasurer inadvertently sold the property for the full amount of the taxes without crediting the installments paid thereon by the plaintiff."<sup>5</sup> The default of the plaintiff in paying an installment was a condition precedent to the right of the City to enforce the tax lien for the unpaid balance of the taxes.<sup>6</sup> If the specific provision of the contract determined the rights of the parties on default of the taxpayer, what basis was there for the majority of the Appellate Division holding that the complaint did not state a cause of action?

Even if the contract had contained no provision relating to the default of the taxpayer, the decision of the Appellate Division would be difficult to justify, since the purpose of the statute was to aid the taxpayer in paying his delinquent taxes. The duty to pay taxes is a thrust obligation and not a contractual one.<sup>7</sup> The compromise agreement gave rise to no new obligation on the part of the plaintiff;<sup>8</sup> it merely provided a more advantageous means of payment. The tax lien was merely a security for the pre-existing obligation; its extent was measured by the unpaid obligation.<sup>9</sup> When the city, by mistake, sold the tax lien for its face value, the defendant had in its possession the plaintiff's eight installments. This sum of \$2,688, which was equivalent to four-fifths of the plaintiff's tax obligation, the city cannot in good conscience retain.<sup>10</sup> By breach of the contract by the city, through mistake, there was a total failure of consideration for the partial payments previously made by the plaintiff.<sup>11</sup>

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<sup>4</sup>MacMurray v. City of Long Beach, 292 N. Y. 286, 289, 54 N. E. (2d) 828, 829 (1944).

<sup>5</sup>*Id.* at 290, 54 N. E. (2d) at 830.

<sup>6</sup>*Id.* at 289, 54 N. E. (2d) at 829.

<sup>7</sup>"A distinguishing feature of a tax is that it is compulsory rather than a matter of bargain. . . . In other words it is never founded on contract or on agreement. . . ." 1 COOLEY, TAXATION (4th ed. 1924) § 3; 61 C. J. § 3. See *Gautier v. Dittmar*, 204 N. Y. 20, 97 N. E. 464 (1912).

<sup>8</sup>"The power to tax is wholly statutory. . . . Taxes do not rest upon contract, express or implied. They are obligations imposed upon citizens to pay the expenses of the government. They are forced contributions, and in no way dependent upon the will or contract, express or implied, of persons taxed." *City of Rochester v. Bloss*, 185 N. Y. 42, 47, 77 N. E. 794, 795 (1906).

<sup>9</sup>26 R. C. L. 136.

<sup>10</sup>"Independent of any statute, form of action, or legal nomenclature, the obligation to do justice rests upon all persons, natural or artificial, and the law will compel restitution from a person who claims money or property from another . . . unjustly, or without authority." *Pink v. Title Guarantee & Trust Co.*, 274 N. Y. 167, 173, 8 N. E. (2d) 321, 323 (1937).

<sup>11</sup>*Newman v. Supervisors of Livingston County*, 45 N. Y. 676, 688 (1871); "No sound reason exists for exempting even municipal corporations from the controlling effects of the wholesome principle that when the consideration has failed, the contract price should be repaid. . . ." *id.* at 687; ". . . for it is equally as unjust and inequitable for them [municipal corporations] to retain the money they have acquired without consideration, as it is for a private person to attempt to do so." *Chapman v. City of Brooklyn*, 40 N. Y. 372, 380 (1869); *Strough, as Supervisor, v. Board of Supervisors of Jefferson*



Ordinarily, voluntary payments made by a taxpayer under a mistake of law cannot be recovered.<sup>12</sup> In the instant case no question of voluntary payment existed, for the city sold the premises of the plaintiff for an amount in excess of the sum actually due. An action for money had and received<sup>13</sup> will lie to recover taxes paid to a municipality under a mistake of fact<sup>14</sup> or where taxes are illegally assessed and collected.<sup>15</sup>

If the taxpayer had completely paid the tax obligation, the lien would have been extinguished and any subsequent sale for the taxes would be void.<sup>16</sup> The complaint undeniably stated a cause of action against the city on the contract, an aspect of the case which was not considered by the Court of Appeals. If the terms of the contract determined the rights of the plaintiff either upon payment of the tax or upon default, by sale of the tax lien, the sale by the city, by mistake, for the original tax claim was really the only breach under the contract. The damages suffered by the breach were the sums which the plaintiff had paid on the contract. Whether the plaintiff sought to state an action on the contract or in quasi contract, the complaint stated a cause of action. Under either theory, the Court of Appeals properly reversed the judgment of the Appellate Division and denied the motion to dismiss the complaint.

*David Marcus*

City, 119 N. Y. 212, 23 N. E. 552 (1890) (Taxes were not applied for purpose for which they were levied). See *Colville v. Besly*, 2 Denio 139, 142 (N. Y. 1846); *Redmond et al. v. Mayor, etc. of N. Y.*, 125 N. Y. 632, 638, 26 N. E. 727, 729 (1891); *Kilbourne, as Supervisor, v. Board of Supervisors of Sullivan County*, 137 N. Y. 170, 177, 33 N. E. 159, 161 (1893); *Woods, as Supervisor, v. the Board of Supervisors of Madison County*, 136 N. Y. 403, 407, 32 N. E. 1011, 1011 (1893).

<sup>123</sup> COOLEY, TAXATION (4th ed. 1924) § 1294; WOODWARD, QUASI CONTRACTS (1913) § 35. "When relief against mistake is sought in an action or proceeding or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact." N. Y. CIV. PRAC. ACT § 112-f (1942).

<sup>13</sup>*Strough v. Board of Supervisors of Jefferson County*, 119 N. Y. 212, 23 N. E. 552 (1890).

<sup>14</sup>*Bridges v. Supervisors of Sullivan County*, 92 N. Y. 570 (1883); *Colville v. Besley*, 2 Denio 139 (N. Y. 1846); "The action for money had and received, in general, lies for money which *ex aequo et bono*, the defendant ought to refund, as for money paid by mistake; . . . A mistake which entitles a party to sustain this action must be a mistake of fact." *Mowatt v. Wright*, 1 Wendell 356, 360 (N. Y. 1828); *Mayer v. Mayor, Aldermen and Commonalty of City of N. Y.*, 63 N. Y. 455 (1875) (where plaintiff paid an assessment on lot of another by mistake); 4 DILLON, MUNICIPAL CORP. (5th ed. 1911) § 1622.

<sup>15</sup>*Bank of Commonwealth v. Mayor*, 43 N. Y. 184 (1870); *Newman v. Board of Supervisors of Livingston County*, 45 N. Y. 676 (1871); *Chapman v. City of Brooklyn*, 40 N. Y. 381 (1869); *Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604 (1891); *Lewis v. City of Lockport*, 276 N. Y. 336, 12 N. E. (2d) 431 (1938) (recovery denied on other grounds); *Redmond v. Mayor of N. Y.*, 125 N. Y. 632, 26 N. E. 727 (1891) (recovery denied where payment was made with knowledge of illegality of the assessment and the money was used for the stipulated purpose); see *Chapman v. Board of County Commissioners of County of Douglas*, 107 U. S. 348, 12 Sup. Ct. 62 (1882) (where money was obtained by city under illegal contract).

<sup>16</sup>"If the owner or any other person entitled to make payment of a tax shall do so, the lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end." 3 COOLEY, TAXATION (4th ed. 1924) § 1258; *Oliphant v. Burns*, 146 N. Y. 218, 40 N. E. 980 (1895).

**Real Property: Covenants running with the land: Conditions subsequent.**—One of plaintiff's predecessors in title deeded to defendant water company land for use in constructing a new reservoir. After describing the land conveyed, the deed stated: "Provided always, that in the event of the party of the second part in making and constructing a new reservoir, or any part thereof, shall disturb and destroy a certain spring situate on the lands of the party of the first part and which supplies water to the house of the party of the first part, then and in that event the party of the second part agrees to put into the house and barn of the party of the first part and to furnish her, and her heirs forever a supply of water from the system of the Owego Water Works equal to that now supplied by the said spring free of all charge for connection and water rents." Subsequently the premises on which the house and barn were located were conveyed to different parties and plaintiff became the owner in 1942. Since the opinion makes no reference to express assignment of the benefit of the quoted provision by any of plaintiff's predecessors in title, it is probably safe to assume that no such assignment occurred. The spring was destroyed when defendant constructed its reservoir, and defendant supplied water according to the agreement until February 1, 1943, when defendant notified plaintiff that unless he paid a water charge the water would be turned off. *Kemp et al. v. Owego Water Works*, 267 App. Div. 849, 45 N. Y. S. (2d) 794 (3d Dep't 1944). Plaintiff sought an injunction restraining defendant from shutting off the water.

The trial court found that the quoted part of the deed was a covenant running with the land and granted the injunction. Defendant appealed on the ground that the language in question constituted a condition subsequent and that the plaintiff, not being an heir of the original grantor, was unable to take advantage of the breach of condition. The decision of the trial court was affirmed without opinion by the Appellate Division. The decision seems obviously correct, since the deed created a covenant to the benefit of which plaintiff succeeded despite the apparent lack of an express assignment.

Even though there had been a condition, and this seems doubtful,<sup>1</sup> plaintiff, to succeed, had only to show that the deed created a contractual obligation as well, and that he was entitled to the benefit of it.<sup>2</sup> The first part of this

<sup>1</sup>The presumption against such condition was not overcome by the use of words usually employed for that purpose, *viz.*, "upon express condition that" or the inclusion of a clause providing for re-entry or termination. Moreover, defendant's interest at the time of making the agreement would favor the interpretation that a covenant rather than a condition had been created. It is hardly conceivable that a water company would purchase land for a reservoir under any condition that might entail forfeiture. On the other hand, no objection would arise to a covenant to supply free water if the spring were destroyed, as such an arrangement would be considered as the payment of rent, or as part of the purchase price of the land. See *RESTATEMENT, PROPERTY* (1936) § 45, comments 1 and n; § 24; *Matters of Gaffers*, 254 App. Div. 455, 5 N. Y. S. (2d) 671 (3d Dep't 1938); *Carruthers v. Spaulding*, 242 App. Div. 412, 275 N. Y. Supp. 37 (4th Dep't 1934); *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655 (1890); *Post v. Weil*, 115 N. Y. 361, 22 N. E. 145 (1889); *Avery v. New York Central and H. R. R.R. Co.*, 106 N. Y. 142, 12 N. E. 619 (1887).

<sup>2</sup>Covenants and conditions are not, of course, mutually exclusive. A grantor may employ either or both. *Munro v. Syracuse L. and N. R.R. Co.*, 200 N. Y. 224, 231, 232, 93 N. E. 516, 519 (1910).

task he was clearly able to perform. The language of the deed is virtually conclusive: "The party of the second part *agrees*<sup>3</sup> . . . to furnish to her and to heirs forever," etc. The word "agrees" definitely shows an intention to contract. The surrounding facts and circumstances also tend to support this conclusion. The original grantor could not have intended to accept a mere condition which, unsupported by a promise, would leave the defendant with the legal privilege of breaking the condition and forfeiting the land, and the owner of the house and barn, in case of breach, without free water.<sup>4</sup>

The plaintiff could just as easily show himself entitled to the benefit of the promise. One theory upon which he could successfully rely is that the benefit of the promise ran to him with the land.<sup>5</sup> Since this is a case involving only the running of the benefit of a covenant, plaintiff had no need to show any privity of estate between the parties to the covenant.<sup>6</sup> As successor to the estate of the original covenantee, he could enforce the covenant in equity, provided that he could show that it was intended by the parties to run and that it touches and concerns the land.<sup>7</sup>

As this was an action in equity, and concerned only with the running of the benefit, plaintiff was not impeded by the rule which some courts have deduced from *Spencer's Case*<sup>8</sup> requiring, as a test of intention, the use of the word "assigns" when the covenant concerns something not in being.<sup>9</sup> The employment in the deed of the phrase "to her and her heirs forever" is sufficient to indicate the intention that the covenant should run;<sup>10</sup> and this conclusion is buttressed by the obvious fact that the owner of the house and

<sup>3</sup>Italics are the author's.

<sup>4</sup>Walsh, *Conditional Estates and Covenants and Running with the Land* (1937) 14 N. Y. U. L. Q. REV. 162, 175, 1 TIFFANY, REAL PROPERTY (3d ed. 1939) 364; Northwestern Univ. v. Wesley Memorial Hospital, 290 Ill. 205, 215, 125 N. E. 13, 18 (1919).

<sup>5</sup>RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1943) § 95; and see CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND (1929) 91; 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1410.

<sup>6</sup>RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1943) § 96; 165 Broadway Bldg. Inc. v. City Investing Co. *et al.*, 120 F. (2d) 813 (C. C. A. 2d, 1941).

<sup>7</sup>RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1943) §§ 79, 91; CLARK, COVENANTS (1929) 148-150 and footnotes; Stone, *Equitable Rights and Liabilities of Strangers to a Contract* (1919) 19 COL. L. REV. 179 *et seq.*; Bauby *et al.* v. Krasow *et al.*, 107 Conn. 109, 137 Atl. 508, 57 A. L. R. 331, 336 (1927).

<sup>8</sup>5 Co. 16a, 77 Eng. Repr. 72 (1583); for a discussion of this case and its effect on the law of running covenants in deeds see Bordwell, *English Property Reform and Its American Aspects* (1927) 37 YALE L. J. 1; Abbott, *Covenants in a Lease Which Run with the Land* (1920) 31 YALE L. J. 127.

<sup>9</sup>The writer has found no case in equity which has required the use of the word "assigns", or even any "express words" so long as the subject matter of the covenant touched and concerned the land and the intention that the covenant was to run was by some means clearly shown; even law courts are now becoming less strict. See 165 Broadway Bldg. Inc. v. City Investing Co. *et al.*, 120 F. (2d) 813 (C. C. A. 2d, 1941); Sexauer v. Wilson, 136 Iowa 357, 113 N. W. 941 (1907); Brown v. So. Pac. Co., 36 Ore. 128, 58 Pac. 1104 (1899); Gilmer v. Mobile and M. Ry. Co., 79 Ala. 569, 58 Am. Rep. 623 (1885), Walsh, *supra* note 4, at 166; 3 HOLDSWORTH, HIST. OF ENG. LAW (1924) 162.

<sup>10</sup>RESTATEMENT, PROPERTY (Proposed Final Draft, No. 2, 1943) § 79, comment c; §92, comment c. Abbott, *Covenants in a Lease Which Run with the Land* (1920) 31 YALE L. J. 127, 146.

barn would have been unwilling to cut off from her premises the perpetual free water supply which they then enjoyed unless she were assured of another supply both perpetual and free.

A covenant to deliver water without charge to a specified tract of land obviously touches and concerns that tract.<sup>11</sup>

A second theory by which the plaintiff in the instant case could show himself entitled to the benefit of the promise is that of implied assignment. Since it is clear, as pointed out above, that it was the intention of the parties to the original agreement that successive owners of the house and barn should have the benefit of defendant's promise to supply water gratis, it would be justifiable, in the absence of express provisions to the contrary, to imply an assignment of the benefit of the promise in each of the deeds constituting the chain of title from the original promisee to the plaintiff. While it is true that the courts have become so accustomed to dealing with cases like the one under discussion in terms of running covenants that they rarely explain the passage of the benefit of a covenant to a plaintiff in terms of assignment,<sup>12</sup> there seems to be no sound reason why they should not do so in view of the fact that the assignability of the benefits of promises has become thoroughly established.<sup>13</sup> Thus in the field of covenants for title, courts have not infrequently resorted to the theory of an implied assignment to transfer a benefit to a remote grantee who could not receive it under the doctrine of running covenants because of the rule that covenants cannot run after breach.<sup>14</sup>

And finally it would seem that the plaintiff in the instant case could establish his right to the benefit of the promise by invoking the contract beneficiary doctrine.<sup>15</sup> While New York has been hesitant to allow the intended beneficiary of every contract to sue thereon,<sup>16</sup> it has taken the position that a

<sup>11</sup>Jourdain v. Wilson, 4 B. and Ald. 266 (K. B. 1821); "The benefit of a promise can run with land only if it is a promise respecting the use of land of the beneficiary of the promise. A promise is a promise respecting the use of land of the beneficiary of the promise if . . . the performance of the promise will constitute an advantage in a physical sense to the beneficiary in the use of his land." RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1943) § 91(1), (2a); "If the promisee's interest in land is increased—rendered more valuable—by the covenant, then the benefit thereof touches his land. . . ." Bigelow, *The Contents of Covenants in Leases* (1914) 12 MICH. L. REV. 639, and Note (1938) 24 CORNELL L. Q. 133, 136; Neponsit Property Owner's Ass'n, Inc. v. Emigrant Industrial Savings Bank, 278 N. Y. 248, 15 N. E. (2d) 793 (1938). See also 165 Broadway Bldg. Inc. v. City Investing Co. *et al.*, 120 F. (2d) 813 (C. C. A. 2nd, 1941).

<sup>12</sup>But see Masury v. Southworth, 9 Ohio St. 340 (1859) (where this method of passing the benefit of a covenant in a lease is adopted).

<sup>13</sup>RESTATEMENT, CONTRACTS (1932) § 151.

<sup>14</sup>Geiszler v. DeGraaf, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659 (1901); Schofield v. Iowa Homestead Co., 32 Iowa 317, 7 Am. Rep. 197 (1871); RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1943) c. 3, Introductory Note.

<sup>15</sup>Sims, *The Law of Real Covenants* (1944) 30 CORNELL L. Q. 1, 37; RESTATEMENT, CONTRACTS (1932) § 133; RESTATEMENT, PROPERTY, *op. cit. supra* note 14.

<sup>16</sup>Seaver v. Ransom, 224 N. Y. 233, 120 N. E. 639 (1918), 2 A. L. R. 1187, 1193 (1919). It is doubtful whether in New York, plaintiff could show himself an intended creditor beneficiary under the rule set forth in this case, since at the time of making

suit in equity can be maintained by the intended beneficiary of a promise concerning land.<sup>17</sup> The same considerations on which plaintiff could rely to support the conclusion that the benefit of the covenant was intended to run if he were relying on the theory of running covenants, can be invoked by him to demonstrate that he is an intended beneficiary of the promise.

It should be observed that the plaintiff company is a private water works, and that there are no applicable village or state regulations. The company therefore has no lien on land for arrears, nor is its power to contract in this respect restricted by the law governing public utilities.

Magdalen G. H. Flexner

**Torts: Right of privacy: Requirement of written publication.**—In the recent case of *Gregory v. Bryan-Hunt Co. et al.*, 295 Ky. 345, 174 S. W. (2d) 510 (1943), the Court of Appeals of Kentucky was called upon to further define the right of privacy as recognized in that state.<sup>1</sup> The plaintiff was the general manager and principal stockholder of the Begley Drug Co., a corporation engaged in the drug business and the dispensing of meals to the general public in Danville, Kentucky. The defendant was a corporation which had its office and principal place of business in Lexington, Kentucky. Plaintiff, in an action for invasion of his right of privacy, alleges that officers of defendant corporation entered his place of business and in the presence of plaintiff and customers then in the store asserted, "in an oppressive, insulting and boisterous way and manner," that the plaintiff and the Begley Drug Co. had cigarettes in their possession which had been stolen from defendant corporation. Defendants seized and carried away a number of cartons of cigarettes. Plaintiff alleges that these cigarettes were not stolen but were the property of the Begley Drug Co. The action was brought to

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the covenant, the covenantee owed no obligation to her successors in title, and it is not clear whether the covenantee gave any warranty of title, which would include a warranty of water supply, to the first of plaintiff's predecessors in title so as to create an obligation, which, though arising after the making of the original covenant, still clearly identifies the intended creditor beneficiary.

<sup>17</sup>*Vogeler v. Alwyn Improvement Corp.*, 247 N. Y. 131, 159 N. E. 886 (1928); Note (1928) 13 CORNELL L. Q. 619; RESTATEMENT, PROPERTY (Proposed Final Draft No. 2, 1943) § 89, comment e.

<sup>1</sup>See *Brents v. Morgan*, 221 Ky. 765, 299 S. W. 967 (1927). The defendant, a garage-man, had posted a notice five feet by eight feet in size in his shop window which read as follows: "Notice—Dr. W. R. Morgan owes an account here of \$49.67. And if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid." The court allowed recovery to plaintiff in his action for invasion of his right of privacy. The words of the notice were true. Truth, being a full defense both at common law and by statute in Kentucky, left plaintiff without a remedy in slander. The court pointed out that in no event is a right of privacy action a substitute for other available remedies. It also stated that there would be no grant of redress for the invasion of privacy by oral publication.

recover \$25,000 damages for personal humiliation, mental pain, anguish and injury to feelings allegedly suffered by plaintiff.

Defendants demurred on the ground that if any action was maintainable against them, it should be instituted in the name of the Begley Drug Co. The Court sustained the demurrer. Plaintiff declined to plead further and the Court dismissed the petition. Plaintiff appealed and judgment was affirmed on the ground that plaintiff's allegations did not state a cause of action for violation of plaintiff's right of privacy. The Court stated that a right-of-privacy action is not available when any alternative theory is open to plaintiff. An action for slander was suggested as the proper remedy. The Court also pointed to the further limitation that in Kentucky an action for an invasion of the right of privacy by verbal interferences is limited to statements made in writing and does not extend to merely oral statements.

On the basis of the allegations set forth in plaintiff's complaint, the Court is patently correct in designating slander as the proper remedy here. The requisite elements of the action are present in the plaintiff's allegations, including oral publication of false statements in the presence of customers in plaintiff's store, defamatory imputations with respect to ownership of the cigarettes and damage in the form of plaintiff's lowered esteem in the minds of friends and patrons. If plaintiff were successful in a slander action, he might gain redress for the alleged humiliation and mental anguish which his original complaint sets forth. For while slander does not directly concern itself with these strictly personal elements, they may be attached for purposes of parasitic damages to an independent slander action.<sup>2</sup> Plaintiff's choice of remedy was, in final analysis, defective.

The right-of-privacy action seems properly a remedy of last resort. The use of the remedy is carefully restricted by the courts even in those few jurisdictions which recognize its existence.<sup>3</sup> It does seem possible, however, that its scope can be extended in certain situations, without any great danger, and that a remedy might thus be provided to deserving parties who are otherwise helpless.

In the instant case there is no apparent basis for plaintiff's choice of remedy. Plaintiff alleged that the cigarettes were the property of the Begley Drug Co. If true, this would bar defendant from pleading truth as a defense in a slander action. But for purpose of this consideration of the possible benefits of a broader application of the right-of-privacy action, we will examine the same situation, but with the assumption that plaintiff was, without his own knowledge, in possession of stolen cigarettes.

What is the effect of this assumed change in the facts? The general rule

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<sup>2</sup>*Craney v. Donovan*, 92 Conn. 236, 102 Atl. 640 (1917); *Pion v. Caron*, 237 Mass. 107, 129 N. E. 369 (1921); *Poleski v. Polish-American Pub. Co.*, 254 Mich. 15, 235 N. W. 841 (1931); *Baker v. Winslow*, 184 N. C. 1, 113 S. E. 570 (1922); *Viss v. Calligan*, 91 Wash. 673, 158 Pac. 1012 (1916).

<sup>3</sup>The following jurisdictions have judicially adopted the right of privacy: Cal., Col., Ga., Ill., Kan., Ky., La., Mo., N. J., N. C., Pa., S. C.

is that truth is a complete defense to a slander action.<sup>4</sup> This is statutory in Kentucky.<sup>5</sup> Thus in most jurisdictions plaintiff would be without remedy regardless of the extent or malice of the defendant's publication.<sup>6</sup> Right of privacy as the basis of suit would be barred because publication was oral.<sup>7</sup> It does not seem necessary, however, to extend the right of privacy to rectify this situation. A broadening of the established defamation action seems preferable. Some jurisdictions, by statute, allow truth as a defense only if the defendant can show that publication was made with good motive or justifiable purpose.<sup>8</sup> The publisher is given a qualified privilege rather than an unqualified privilege. The jury question under the above limitation is whether the alleged manner of the publication was or was not justifiable under the circumstances. If the facts as published are found to be true, and the defendant's qualified privilege of publication was not abused, he would have a full defense.

Another minority approach is to require not only literal truth of the publication, but also that the innuendo or inference which a reasonable person would draw from the published words be true.<sup>9</sup> This does not penalize the manner of publication except insofar as it has bearing on the question of reasonable interpretation.

Either of the above minority views seems preferable to the use of right-of-privacy with its inherent dangers of vexatious and petty suits. A studied expansion of slander along these lines would defeat the arguments of those who expound the need for a sweeping right-of-privacy action. But take the facts of the present case one step further and a corner of the law is revealed where at present no remedy does exist. Assume the same situation as last considered, except that the publication occurs in the plaintiff's home and in the presence of friends rather than in his place of business in the presence of customers. In slander the general rule is that a cause of action must allege special damage.<sup>10</sup> An exception to this rule covers the principle case, however, for when the alleged imputation affects plaintiff in his trade or business, damage is presumed.<sup>11</sup> If publication were made in plaintiff's home, it would be difficult if not impossible, in most cases, to show such special damage. Yet a right-of-privacy action, which does not require an allegation of special damage, would be barred on the basis of oral publication.<sup>12</sup> The net result is that in some cases a plaintiff might be irritatingly

<sup>4</sup>PROSSER, TORTS (1941) 854: ". . . truth was and is a defense to any civil action for either libel or slander in the great majority of jurisdictions."

<sup>5</sup>KY. CODE CIVIL PRACTICE (Carroll, 1927) § 124.

<sup>6</sup>Herald Pub. Co. v. Feltner, 158 Ky. 35, 164 S. W. 370 (1914); Williams v. Hicks Printing Co., 159 Wis. 90, 150 N. W. 183 (1914); RESTATEMENT, TORTS (1938) § 582.

<sup>7</sup>Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927), cited *supra* note 1.

<sup>8</sup>See e.g. Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N. E. 587 (1919); Wertz v. Spracher, 82 Neb. 834, 118 N. W. 1071 (1908); Barger v. Hood, 87 W. Va. 78, 104 S. W. 280 (1920).

<sup>9</sup>Note (1928) 13 CORNELL L. Q. 469.

<sup>10</sup>McCORMICK, DAMAGES (1935) 415.

<sup>11</sup>*Ibid.*

<sup>12</sup>Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927), cited *supra* note 1.

subjected to all the elements which a proper right-of-privacy action sets forth, but be without remedy.

It is submitted that in such cases as this last, the true need for a right-of-privacy action is evidenced. But to make it available, the artificial requirement of a written publication must be removed. The unbending retention of the old distinction between written and oral publication is clearly open to criticism. In view of the wide-spread use of the radio and other conduits of opinion and speech, it seems that defamation and invasion of right of privacy can today be quite as effectively accomplished by oral as well as by written means. The suggestion of an eminent text-writer, made with respect to a joinder of the actions of libel and slander, appears to merit consideration.<sup>13</sup> The suggestion is that the actual basis for joining libel and slander and letting the joint action lie be the extent of publication, whether written or oral, and based on the particular facts of the case. It could be accomplished in this relatively new field of the law without the necessity of toppling over a mass of precedent. A distinction on the basis of *de minimus non curat lex* could be made between major and minor invasions of privacy, and only the former made actionable without proof of specific damage.

It is not urged that all qualifications be immediately dropped. Extension of the limits of the action for the invasion of the right of privacy should be made cautiously. The normal incidents of everyday life produce a host of unpleasant personal relationships and contacts which a too loose and ready application of the right-of-privacy doctrine might make actionable with the result that all sorts of petty actions might conceivably fill the courts. This is no doubt responsible in large part for the slow growth of the doctrine. But the above-considered situations do seem to point out that one of the penalties of a too strict adherence to precedent is the denial, in a considerable number of cases, of a remedy to a deserving party.

Bradford F. Miller

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<sup>13</sup>PROSSER, TORTS (1941) 809.